Kewangan Bersatu Bhd (previously known as Kewangan Usaha Bersatu Bhd) v Metropolitan Property Holdings Sdn Bhd

HIGH COURT (PENANG) — ORIGINATING SUMMONS NO 24–522–1994
SELVENTHIRANATHAN J
16 JULY 1995

Civil Procedure *— Originating summons — Charge action — Order for sale — Whether affidavit in support affirmed before date of filing of originating summons valid*

Land Law *— Charge action — Order for sale — Chargee had obtained judgment against borrower and guarantor but had not executed judgment — Whether chargor had shown cause why order for sale should not be given — Whether chargee's indulgence towards borrower and guarantor had prejudiced chargor*

In consideration of the plaintiff granting a loan to a third party, the defendant charged its land to the plaintiff. There was also a guarantor in respect of the loan. The borrower defaulted on the loan and the plaintiff issued a statutory demand to the defendant to pay the sum due to the plaintiff. Upon the defendant's failure to comply with the demand, the plaintiff applied for an order for sale of the defendant's land. The plaintiff had previously obtained judgment against the borrower and the guarantor, but had not commenced execution proceedings against them. The defendant raised a preliminary objection that the affidavit supporting the originating summons was dated earlier than the date of the originating summons. The defendant therefore contended that the originating summons was not in order because the affidavit should have been affirmed on the same day as that on which the originating summons was filed or later, but not earlier. The defendant further argued, inter alia, that the plantiff's failure to execute the judgment obtained against the borrower and the guarantor, had prejudiced the defendant.

Held, dismissing the preliminary objection and allowing the plaintiff's application:

(1) In the absence of any requirement of law for the affidavit to be affirmed on the same date as that on which the originating summons is filed or later, an affirmation which precedes the filing of the affidavit is in order. There is also no requirement for the affidavit to be affirmed at the same time that the originating summons is filed (see p 83B–C, E).

(2) The plaintiff was within its rights in seeking to enforce the defendant's covenants under the charge agreement. Any indulgence that the plaintiff granted to the borrower, the guarantor or the defendant in respect of the loan did not in any way detract from the plaintiff's rights under charge agreement (see p 88A).

(3) The defendant had not succeeded in showing any cause to the contrary why an order for the sale should not be made (see p 88C). A

Per curiam:

Under O 41 r 9(2), reference to 'every affidavit' is made in the singular, and reference to 'dates' is in the plural. This goes to show that the Rules Committee in drafting O 41 r 9(2), envisaged that an affidavit could be affirmed at an earlier date and filed at a later date, depending on the dictates of necessity and situational factors (see p 83G). B C

[Bahasa Malaysia summary

Defendan telah menggadaikan tanahnya kepada plaintif sebagai balasan untuk pinjaman plaintif kepada pihak ketiga. Pembayaran balik pinjaman juga telah dijamin oleh seorang penggerenti. Peminjam tersebut telah ingkar dalam membayar balik pinjaman dan plaintif telah menyampaikan tuntutan statutori kepada defendan. Apabila defendan gagal mematuhi tuntutan tersebut, plaintif telah memohon suatu perintah jualan terhadap tanah defendan. Sebelum itu, plaintif telah memperolehi penghakiman terhadap peminjam dan pengerenti, tetapi plaintif belum melaksanakan penghakiman tersebut. Defendan telah menimbulkan bantahan permulaan bahawa afidavit yang menyokong saman pemula itu adalah bertarikh lebih awal dari tarikh saman pemula itu. Oleh yang demikian, defendan berhujah bahawa saman pemula itu adalah cacat kerana afidavit seharusnya diikrarkan pada tarikh yang sama seperti tarikh bila saman pemula itu difailkan atau selepas tarikh pemfailan saman pemula itu, tetapi bukan lebih awal. Defendan seterusnya berhujah, antara lainnya, bahawa kegagalan plaintif untuk melaksanakan penghakiman terhadap peminjam dan penggerenti telah memudaratkan defendan. D E F

Diputuskan, menolak bantahan permulaan dan membenarkan permohonan itu: G

(1) Jika undang-undang tidak menghendaki supaya sesuatu afidavit itu diikrarkan pada atau selepas tarikh pemfailan saman pemula, afidavit yang diikrarkan sebelum pemfailan afidavit tersebut adalah tidak cacat. Afidavit tersebut juga tidak perlu diikrarkan pada masa pemfailan saman pemula (lihat ms 83B–C, E). H

(2) Plaintif berhak untuk menguatkuasakan waad defendan di bawah perjanjian gadaian. Apa-apa kelonggaran yang diberi oleh plaintif kepada peminjam, penggerenti atau defendan berkenaan pinjaman tidak menjejaskan hak plaintif di bawah perjanjian gadaian (lihat ms 88A). I

(3) Defendan telah gagal menunjukkan apa-apa sebab kenapa perintah jualan tidak seharusnya dibuat (lihat ms 88C).

Per curiam:

Di bawah A 41 k 9(2), rujukan kepada 'tiap-tiap afidavit' adalah dalam bentuk mufrad, tetapi rujukan kepada 'tarikh-tarikh' adalah dalam bentuk jamak. Ini menunjukkan bahawa apabila Jawatankuasa Kaedah-Kaedah menggubal A 41 k 9(2), ia telah membayangkan bahawa suatu afidavit boleh diikrar pada satu tarikh yang lebih awal dan difailkan pada satu tarikh yang terkemudian, bergantung kepada faktor-faktor keperluan dan keadaan.]

[*Editorial note*: The defendant has appealed to the Court of Appeal vide Civil Appeal No P–02–345–95.]

Cases referred to

Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Anor [1989] 1 MLJ 457
Sobri bin Arshad v Associated Tractors Sdn Bhd [1991] 3 MLJ 32
Stacey v Diamond Metal Products Co Ltd & Anor [1935] MLJ 249

Legislation referred to

National Land Code 1965 s 254, Form 16D
Rules of the High Court 1980 O 28 r 3(3), O 41 r 9(1), (2), O 83 rr 1, 2(2)
Bankruptcy Act 1967 s 6
Bankruptcy Rules 1969 r 106

Hee Kang Yow (*Jeyaratnam & Chong*) for the plaintiff.
Cedric N Miranda (*Riza Leong & Partners*) for the defendant.

Selventhiranathan J: In consideration of the plaintiff (Kewangan Bersatu Bhd, the lender) granting a loan facility of RM500,000.00 to the borrower (Madak Development Sdn Bhd), the defendant (Metropolitan Property Holdings Sdn Bhd) charged certain pieces of land ('the lands') of which it was registered owner to the plaintiff. The loan was subject to a variable interest rate, which at the time of the execution of the charge document on the 11 December 1986 was specified at 3% pa above the base lending rate of the plaintiff, which was 12% pa. The parties agreed that the defendant would pay to the plaintiff on demand the loan amount and all sums and moneys as were or may become payable by the defendant and/or the borrower under the charge. However, the charge document also provided that:

> ... unless such demand is made, [the defendant] and/or the borrower shall pay the loan within forty-two months from the initial drawdown date of the loan by and payable in accordance with the following schedule:

Month from initial drawdown	Amount (RM)
24th month	125,000.00

30th month	125,000.00
36th month	125,000.00
42nd month	125,000.00
	500,000.00

The loan was also guaranteed by one Abdullah @ Mohd Nudin bin Mohamed.

The borrower defaulted on the loan, and the plaintiff issued a notice in Form 16D pursuant to s 254 of the National Land Code 1965 ('the NLC') to the defendant, demanding payment of a sum of RM1,079,889.38 being due and owing on 15 November 1993 together with accruing daily interest of RM405.33 from 16 November 1993 until settlement.

The defendant failed and/or neglected to pay the sum demanded, and the plaintiff applied by this originating summons in a charge action as provided for under O 83 of the Rules of the High Court 1980 ('the RHC') for an order that the lands charged by the defendant to the plaintiff be sold by public auction, that the proceeds therefrom be used to settle all sums owing by the defendant to the plaintiff, and for other consequential orders.

For convenience, all references hereinafter to 'section', 'Order' and 'rule' by themselves will mean that section of the NLC, and that Order and rule of the RHC respectively.

At the hearing of this originating summons, Encik Cedric N Miranda for the defendant raised a preliminary objection to it on the ground that it was dated 30 May 1994, whereas the plaintiff's affidavit in support of it was affirmed on 17 May 1994. He contended that this originating summons was, therefore, not in order, because the two documents were filed or affirmed, as the case may be, on different dates. He contended that the affidavit should have been affirmed on the same day as that on which the originating summons was filed or later, but not earlier. He cited from part of a passage at para 1059 of 24 *Halsbury's Laws of England* (4th Ed), as follows in support of his contention:

> The affidavit on an application for an injunction may be made by any person having sufficient knowledge of the facts. It is usually made by the applicant and if no sufficient reason is assigned for no such affidavit being filed the order may be refused. On an ex parte application, if the affidavit is not sufficiently positive, notice of the application may be ordered to be given. The affidavit should not, as a rule, be sworn until after the issue of the writ, ...

without even completing the passage cited from, which goes on to say:

> ... but in exceptional cases the court may grant an interim order even though the affidavit was sworn before the issue of the writ. In such cases the court now requires the affidavit to be resworn and filed and the plaintiff is required to give an undertaking to have this done.

(Authorities cited in the passage quoted from are intentionally not reproduced above.)

A He also relied upon part of a passage from 1 *Mallal's Supreme Court Practice* (2nd Ed) by Tan Sri Datuk Chang Min Tat, at para 41/1/3 headed 'contemplated actions', and relied further on the cases of *Stacey v Diamond Metal Products Co Ltd & Anor* [1935] MLJ 249 and *Sobri bin Arshad v Associated Tractors Sdn Bhd* [1991] 2 MLJ 32, in support of the preliminary objection raised.

B

I dismissed the preliminary objection with costs as being made without basis and having no merit. In the absence of any requirement of law for the affidavit to be affirmed on the same date as that on which the originating summons is filed or later, an affirmation which precedes the filing of the affidavit, as occurred here, is perfectly in order. The plaintiff has an C address at Petaling Jaya, Selangor, where its registered office is located and the deponent of the plaintiff's affidavit is similarly resident there. In such a situation, it militates against common sense and convenience to require the deponent of the plaintiff's affidavit to travel all the way to Penang merely to affirm the affidavit on the same day on which the affidavit as well D as the originating summons is filed, ie 30 May 1994.

Further, O 83 r 2(2) (which is applicable to charge actions, as in this case, in the same way that O 28 r 3(3) is applicable to originating summonses generally) only requires the plaintiff to serve a copy of the affidavit in support of its application on the defendant not less than four clear days E before the hearing of the originating summons. There is no requirement for the affidavit to be affirmed at the same time that the originating summons is filed. In fact, O 41 r 9 (O 41 deals with affidavits in general) reads:

> 9(1) Except as otherwise provided by these rules, every affidavit must be F filed in the registry.
>
> (2) *Every affidavit* must be indorsed with a note showing on whose behalf it is filed and the *dates of swearing and filing*, and an affidavit which is not so indorsed may not be filed or used without leave of the court. (Emphasis added.)

G This goes to show that the Rules Committee in drafting r 9(2) with the reference to 'every affidavit' in the singular and to 'dates' in the plural envisaged that an affidavit could well be affirmed at an earlier date and filed at a later date, depending on the dictates of necessity and situational factors.

H The authorities cited by Encik Miranda are not relevant and therefore, not applicable to the affidavit filed in support of this originating summons. The passage cited from *Halsbury's Laws of England* is in respect of an affidavit in support of an application for an *injunction*, and even then that passage goes on to say that in exceptional cases the court may grant an interim order (ie an interim injunction) even though the affidavit was I sworn before the writ, and that in such cases the court now requires the affidavit to be resworn and filed and the plaintiff is required to give an undertaking to have this done.

The passage cited from *Mallal's Supreme Court Practice* and the case of *Stacey v Diamond Metal Products Co Ltd & Anor* [1935] MLJ 249 refer to contemplated actions. In *Stacey*, the affidavit was affirmed before the issue of the writ and the deponent died before the trial of the action. An application was made to use the affidavit *in place of* the evidence of the deponent which should be given viva voce at the trial, it being a writ action. The application was dismissed on the dual grounds, firstly, of the affidavit not being intituled in that cause or matter (as the writ had yet to be filed when the affidavit was affirmed) and of being incapable of being resworn to show that it was for the purpose of the intended action when it was affirmed. But secondly, and more importantly, it was rejected on the ground that the deponent wad dead, and therefore not available for cross-examination by the adverse party at the trial even if the affidavit should be accepted in evidence. This is what Terrell J had to say at p 250 of the report in *Stacey*:

> It will be seen, therefore, that when the witness can be produced the court has not even a discretion to admit his evidence on affidavit, if the opposite party objects.
>
> Mr Gale on behalf of the respondent to this summons submits that the affidavit is a nullity. I need not consider his arguments based on the form of the affidavit and the absence of any heading as these are irregularities which might in a proper case be waived. The argument however that no affidavit can be sworn in an action which has not yet been commenced is on a different footing. This is more than an irregularity and makes the affidavit, qua affidavit, entirely inadmissible. Certainly there may be cases in which an affidavit sworn a day or two previously, or even affidavits which have not even been sworn, have been used on interlocutory applications, on counsel's undertaking that the affidavit shall be resworn, or sworn and filed, as the case may be. But when the strict rules are relaxed in such instances the principle is not sacrificed, as the court acts on the assumption that counsel's undertaking will be honoured, and when that has been done the requirements of the court's practice have been fully complied with. Apart from such cases affidavits to be used in court proceedings can only be sworn and filed in proceedings that are actually pending. See the *Annual Practice* p 910 (note 'Evidence'), *Daniell's Chancery Practice* (8th Ed) p 1411, *Francombe v Francombe* 11 LT 757 in which it is pointed out that the court will not reject an affidavit which has been sworn before the proceedings were actually intituled provided that it is dated the same day. See also *Silber v Lewin* 33 Sol Jo 707 and *Bowen v Bowen* LR [Ir] 7 Eq 251. Hunter's letter, therefore, is prima facie inadmissible as an affidavit in these proceedings, and as he is dead it never can become admissible by being resworn.
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> Even if from any point of view it could be treated as an affidavit in an intended action, there is still the fatal objection that the plaintiff has never had the opportunity of cross-examining Hunter and that, as Hall VC said, is the true test. Even therefore if this had been an affidavit sworn since the commencement of the proceedings I do not think that the Court ought to exercise its discretion in the defendant's favour. I also think that the present application is an attempt to get round the provisions of the Evidence Ordinance. A statement by a person who is dead is admissible in certain circumstances. I express no opinion as to whether these circumstances have arisen, but if they have not, it is, I think, clear that the provisions of the

A Evidence Ordinance cannot be circumvented by recourse to Rules and Orders which only profess to deal with procedure and not with admissibility.

Finally, the case of *Sobri bin Arshad* [1991] 3 MLJ 32 was relied upon by Encik Miranda totally out of context. It is a requirement of s 6 of the Bankruptcy Act 1967 and r 106 of the Bankruptcy Rules 1969 that the B creditor's petition must be verified by an affidavit of the creditor or of some person on his behalf having knowledge of the facts of the petition. In that case, Edgar Joseph Jr J (as he then was) held, in my view correctly, that the creditor's petition which was dated 10 November 1989 (and which therefore only came into existence or was 'born' on that date) was C incapable of having its contents verified by an affidavit affirmed a day earlier on 9 November as the creditor's petition was not then yet in existence in law. There is no such requirement in O 83 relating to charge actions for the contents of the originating summons to be verified by an affidavit. O 83 r 1 only specifies the reliefs which are claimable in the originating summons whereas O 83 r 3 stipulates what the affidavit should D contain. There is no requirement (or need for that matter) for the affidavit to verify the reliefs claimed in the originating summons.

Encik Miranda then argued that the plaintiff had delayed in making its claim against the defendant which had resulted in the defendant being prejudiced. He referred to the defendant's affidavit (encl 8) where one E Mak Choong Moon, a director of the defendant, stated as follows:

> 5 It was an express term of the said loan that:
>
> (a) the same was repayable by four equal semi-annual payment[s] of RM125,000.00 each, the first of which shall commence at the end of the 24th month from the date of the disbursement; and
>
> F (b) the said loan shall be guaranteed by Dato' Seri Abdullah Mohamed ('the guarantor'), the chairman of the borrower.
>
> 6 I verily believe that having regard to the said term, the said loan should have been repaid in full by the borrower on or about the end of 1988.
>
> 7 Despite the borrower having breached the terms of the said loan, the G plaintiff had failed to take any actions to recover the same from the borrower and/or the guarantor until recently when the plaintiff seek [sic] to foreclose on the subject properties in the purported exercise of its right under the charge.
>
> (A copy of the plaintiff's solicitors' letter of demand dated 18 January 1994 is annexed herewith and marked as exh 'MCM2'.]
>
> H 8 I have been advised by the defendant's solicitors and verily believe that the plaintiff is guilty of laches in not taking action promptly resulting in the snowballing of the amount owing under the borrower's account.
>
> 9 To the defendant's knowledge, to date, the plaintiff has still failed and/or refused to take any action against the borrower or the guarantor.
>
> I 10 As soon as the defendant was served with the letter of demand, through its solicitors, the defendant requested from the plaintiff's solicitors the status of the plaintiff's action against the borrower and the guarantor in the recovery of the said loan but to date the plaintiff has failed to reply to the same.

11 In the circumstances, it is obvious that the plaintiff's action and/or inaction is tainted with bad faith and it is inequitable to make the defendant responsible for a sum larger than what could be owing (if any) if the plaintiff had acted promptly.

He submitted that the conduct of the plaintiff was 'more than arrogant, boorish or unmannerly' in the circumstances by its not having taken action against the borrower and the guarantor. He cited in support of this contention the case of *Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Anor* [1989] 1 MLJ 457.

Encik Miranda further submitted that the plaintiff had three choices of action under the loan agreement, and that by the plaintiff not informing the defendant of the action taken against the borrower and the guarantor, the defendant had been prejudiced. Had action been taken simultaneously against the defendant, the accumulated balance would have been very much lower. He argued further that by the plaintiff having obtained judgment against the borrower and the guarantor, the defendant had been further prejudiced because the plaintiff need not proceed towards execution of the judgment against the borrower and the guarantor, but could instead proceed to auction the lands in question.

Encik Hee Kang Yow for the plaintiff replied that the NLC specifies the procedure to be followed in cases such as these, with which the plaintiff had complied. The defendant had not given details as to how it was prejudiced. Furthermore, the plaintiff had instituted proceedings against the borrower and the guarantor vide Civil Suit No D2–22–1592–91 in the High Court in Malaya at Kuala Lumpur. Judgment was obtained against the guarantor on 16 March 1993. An appeal was lodged against this decision but was subsequently withdrawn. Judgment against the borrower was then obtained in the same civil suit on 18 August 1994. The judgment showed that the amount owing on 31 July 1991 was RM832,960.80.

I found the various contentions of Encik Miranda to be without merit. With every respect to him, the very case of *Keng Soon Finance Bhd* which he cited to show that the plaintiff here was 'more than arrogant, boorish or unmannerly' clearly militated against his arguments. His apparent reliance on the headnotes of the report of the case alone as showing that the appeal was dismissed is unfortunately not borne out by the full judgment of the Privy Council in the case which shows that the appeal would have been allowed if its disposal rested solely upon the grounds relied upon by the then Federal Court in refusing to allow the appellant who was the chargee of the land there to sell the land (see pp 458 to 460 of the report of the judgment in *Keng Soon Finance Bhd*). Furthermore, the appeal was in fact allowed on a different ground raised for the first time before the Privy Council, ie that the chargor of the land was an unlicensed housing developer which therefore raised directly the question of the legality of the charge. At any rate, *Keng Soon Finance Bhd* is, in my view, sufficient authority for the plaintiff in this originating summons to succeed in its charge action.

On the purported unreasonable behaviour of the plaintiff in not having taken action first against the borrower and the guarantor, the words of Lord Oliver of Aylmerton at pp 459–460 of the report of the judgment in *Keng Soon Finance Bhd* are most apt:

> ... Their Lordships find difficulty in seeing how it can successfully be argued that because, as a matter of indulgence, the chargee refrains from taking the extreme course of enforcing the security immediately, he comes under a continuing obligation to finance a chargor who is in default.
>
> The second ground upon which the Federal Court concluded that no order should be made was that the appellant had behaved 'unreasonably'. Their Lordships can see no ground for this suggestion, which appears to rest on the failure of the appellant's solicitors to answer two letters and on a letter in which they referred to a reference to the mislaying of some architect's certificates as a 'red herring'. Even if there were grounds for castigating this as offensive or discourteous (of which their Lordships are not convinced) it cannot possibly be a good ground for withholding an order for sale. Section 256(3) of the National Land Code 1965 is mandatory. The court 'shall' order a sale unless it is satisfied of the existence of 'cause to the contrary'. Granted that these words have been construed in Malaysia as justifying the withholding of an order where to make one would be contrary to some rule of law or equity, they clearly cannot extend to enabling the court to refuse relief simply because it feels sorry for the borrower or because it regards the lender as arrogant, boorish or unmannerly.

By cl 1 of the charge document, the defendant covenanted to pay to the plaintiff on demand the loan amount and all sums and moneys becoming payable by the defendant and/or the borrower. If the plaintiff did not make any such demand, then it became incumbent upon the defendant and/or the borrower to repay the loan within 42 months from the initial drawdown date of the loan as specified in the schedule to the charge document. This obligation to repay, even without demand, devolved upon the defendant and/or the borrower from the 24th month of the initial drawdown date of the loan. Clause 42 of the charge document constituted the defendant a principal debtor as between the defendant and the plaintiff, and further constituted the lands the principal security for the money due, and any indulgence given to the borrower did not release the defendant from its liability as the surety for the borrower as well as the principal debtor of the plaintiff. By cl 43 of the charge document, all the provisions of the loan agreement were deemed to be incorporated therein.

However, prior to instituting this originating summons, the plaintiff's solicitors wrote to the defendant giving notice that despite several reminders, the borrower had failed to regularize the loan account, and that an outstanding amount of RM1,079,889.38 was due as at 15 November 1993, and further demanding payment thereof from the defendant within seven days of the demand being made. When there was no response to this demand, the plaintiff's solicitors served a notice of default with respect to a charge in Form 16D under s 254 upon the defendant.

In these circumstances, to my mind, the plaintiff was perfectly within its rights in seeking to enforce the defendant's covenants under the charge

document. Any indulgence that the plaintiff granted to the borrower, the guarantor or the defendant in respect of the loan did not in any way detract from the plaintiff's rights as provided for thereunder. In addition, the argument on behalf of the defendant that the plaintiff should have proceeded against the borrower and the guarantor before proceedings against it, could not be sustained in light of the incontrovertible evidence that the plaintiff had, prior to filing this originating summons, instituted proceedings vide Civil Suit No D2–22–1592–91 in the High Court in Malaya at Kuala Lumpur against the borrower and the guarantor, and obtained had judgment.

For all the above reasons, I made an order in terms of the plaintiff's application and awarded costs against the defendant as I found that the defendant had not succeeded in showing any cause to the contrary why an order for the sale of the lands and for the related reliefs should not be made.

Order accordingly.

Reported by Wong Kian Keong